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JUL 2 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON

COA NO. 59614-4-I

SUPREME COURT
STATE OF WASHINGTON

EMIRA RESULOVIĆ,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

PETITION FOR REVIEW

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COURT OF APPEALS
STATE OF WASHINGTON
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I. IDENTITY OF PETITIONER

Petitioner Emira Resulović, a worker of limited English proficiency (LEP), appealed Department of Labor & Industries (Department) orders to the Board of Industrial Insurance Appeals (Board) which rejected her appeals as untimely. When she appealed further, the Superior Court and the Court of Appeals affirmed.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the decision in ***Resulović v. Department of Labor & Industries***, No. 59614-14-I, filed April 21, 2008. APP. A. Reconsideration was denied May 22, 2008. APP. B.

III. ISSUES PRESENTED FOR REVIEW

1. Does receipt of a Department order without a statement of appeal rights in "black faced" type required by RCW 51.52.050 start the 60-day appeal period described in RCW 51.52.060?

2. Does the requirement for uniform treatment under the Industrial Insurance Act (Act) require finding LEP worker appeals timely when filed within 60 days of being informed in language the worker understands of the significance of an English-only Department order?

3. When the Board refuses to provide interpreter services required by law forcing an LEP worker to hire an interpreter, should that worker be denied reimbursement on grounds she was not prejudiced?

4. Is the Department required by statute to provide interpreters for LEP injured workers?

5. When the Department knows a worker is LEP and issues English-only orders to that worker, is that worker entitled to equitable relief from the 60-day time limit for filing an appeal under RCW 51.52.060?

6. Is an LEP injured worker deprived of due process of law when the Department sends English-only orders, knowing she cannot read them?

7. Is an LEP injured worker fluent only in Bosnian deprived of equal protection of the law when the Department refuses to furnish orders and notices to her in her primary language, while furnishing orders and notices in Spanish to Spanish-speaking workers?

8. Is an LEP injured worker entitled to reimbursement for interpreter services incurred for English-only discovery requests she has been ordered to respond to during a Board appeal?

9. Do principles of Equal Access to Justice require finding an LEP worker Board appeal of an English-only order timely if filed within 60 days after she learns of the ruling and appeal rights stated therein?

IV. STATEMENT OF THE CASE

Ms. Resulović came to the U.S. in 1995 lawfully. TR 8/17 8-11.[1]

[1] References to transcripts of Board proceedings appear as TR with date and page number and to the Certified Board Record on Appeal as CBRA with page number.

She was injured at work in 1999. RP 8/17 11-13. CBRA 85, 138. Both she and her husband are both LEP, fluent only in Bosnian. TR 8/17 8.

The Department learned she needed an interpreter to communicate about her injury in February 2002. TR 8/17 14. The Department sends forms, correspondence and orders to workers in Spanish and English, but in no other languages. TR 8/17 25-26. Knowing she lacked English fluency, the Department issued English only orders calculating Ms. Resulović's "wages" and paying a permanent partial disability. APP. C & D.[2] CBRA 90 & 138. Though it paid for interpreters for vocational evaluation and independent medical exam, the Department never informed Ms. Resulović of her appeal rights or responsibilities in a language she understood. TR 8/17 34-36. The Department never sent her any forms required for benefits in Bosnian. TR 8/17 36. Though it had phone interpreters available for staff use, it was Department policy not to give LEP workers the codes necessary to use the service. TR 8/17 29-30. The claim adjudicator testified the Department did not notify her of rights or responsibilities under the Act in Bosnian but Department policy provided interpreters for medical care and forensic evaluations. CBRA 74-75.

[2] Note in APP. D, that the order granting partial disability closed the claim, but is entitled a "Payment Order" -- **not** a "Claim Closure Order."

Ms. Resulović first learned of the contents of any order when her physician informed her that an order closed her claim and the Department refused to pay his bills. She "immediately" went to a lawyer and appealed the very next day. TR 8/17 15-17. CBRA 86-90, 134-138. No evidence contradicts Ms. Resulović's testimony that she did not know the substance of the orders or her appeal right over 60 days before she filed her appeals.

Her appeal requested wage recalculation, treatment for ongoing injuries, total permanent disability, and interpreter services on her claim and at the Board. The appeal stated her LEP status, requested interpreter services, including to communicate with counsel on appeal, and requested reimbursement for interpreter fees she incurred. CBRA 86-90, 134-138.

The Industrial Appeals Judge (IAJ) did not allow an interpreter to interpret between Ms. Resulović and her counsel or order reimbursement for interpreter fees incurred to respond to Department English-only discovery requests. CBRA 108-120, Ex. 7, TR 7/15. This impaired Ms. Resulović in receiving the benefit of representation by retained counsel and cost her money, diminishing her benefits under the Act.

The IAJ & Board found Ms. Resulović was unable to communicate effectively in English but, nonetheless, had appealed late. A split Board found the orders contained "black faced" type as required by RCW 51.52.050. CBRA 4, Finding of Fact 2.

V. ARGUMENT

A. NO APPEAL PERIODS BEGAN AS THE DEPARTMENT ORDERS CONTAINED NO APPEAL RIGHT NOTIFICATION IN "BLACK FACED" TYPE AS REQUIRED BY RCW 51.52.050.

RCW 51.52.050 requires Department orders to state appeal rights language in "black faced" type. See APP. E.[3] The communication of such an order starts the 60-day appeal period in RCW 51.52.060. Neither appealed order has any language in "black faced" type.[4]

The Court of Appeals' disregard of the defective appeal notice in these orders is tantamount to rewriting the statute to omit the "black face" type requirement. Our courts are not authorized to re-write statutes. Instead, "courts are required to give effect to every part of a statute, whenever possible, and should not deem a clause superfluous unless it is the result of an obvious drafting error." ***Dennis v. Dep't of Labor & Industries***, 109 Wn.2d 467, 479, 745 P.2d 1295 (1987).

Giving effect to every part of RCW 51.52.050 leads to the inevitable conclusion that Ms. Resulović did not receive proper notice of the time period in which she must appeal, as required by the Legislature. It follows that the 60-day appeal period in RCW 51.52.060 never started and her appeals were timely.

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[3] **APP. E** contains the full language of RCW 51.52.050 and RCW 51.52.060.

[4] As she could not read the statement in English of her appeal rights, the use of bold face type would have brought the importance of that language to Ms. Resulović's attention.

B. LACK OF UNIFORM TREATMENT VIOLATES THE ACT.

1. Subject to Equitable Exceptions, the Act Requires Uniformity in Timeliness Decisions.

This State and its Courts have an interest in ensuring uniform treatment to injured workers under the Act to foster its beneficial aims. Application of a uniform test on decisions of LEP appeal timeliness is important to ensure all LEP workers receive an adequate opportunity to appeal and receive medical and financial benefits guaranteed by the Act.

In ***Ferenćak v. Dep't of Labor & Industries***, 142 Wn.App. 713, 175 P.3d 1109 (2008), the IAJ found a Board appeal timely, despite being filed six months after order issuance, because it was filed within 60 days "after an interpreter communicated to Mr. Ferenćak the significance of the Department order." The Board agreed. ***Ferenćak*** CBRA 77-78. See **APP. F**. Yet here, though the LEP worker filed her appeals within 60 days of having the significance of order contents first communicated to her in a language she understood, her appeals were found untimely.

There is no evidence in the Board record that Ms. Resulović had, at any earlier time, been informed, in language she understood, that her claim had been closed, how her benefits were calculated, or of her appeal rights. Therefore, applying the Board's test in ***Ferenćak***, Ms. Resulović's appeals should be found timely and remanded for hearings on the merits.

2. **Uniformity in Benefits is Required By the Act.**

Under RCW 51.04.030(1), payment of medical benefits is required:

> consistent with promptness and efficiency, ***without discrimination or favoritism***, and with as great uniformity as the various and diverse surrounding circumstances . . . will permit. [Emphasis added]

To ensure LEP workers receive prompt and efficient medical care, the Department pays interpreters under RCW 51.04.030(1) to avoid "discrimination or favoritism." Provisions on other benefits also require benefits be provided on an equal basis without discrimination.[5]

C. PETITIONER WAS PREJUDICED BY THE BOARD'S FAILURE TO PROVIDE FULL INTERPRETER SERVICES AND IS ENTITLED TO REIMBURSEMENT FOR INTERPRETER EXPENSES INCURRED DURING HER BOARD APPEAL.

Citing RCW 2.43.030 and the Board's own regulations,[6] the Court of Appeals correctly held in ***Kustura v. Dep't of Labor & Industries***, 142 Wn.App. 655, 175 P.3d 1117 (2008), that once the Board elects to provide interpreter services, it "may not prevent the interpreter from translating whenever necessary to assist the claimant during the hearing." The Court of Appeals further held:

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[5] For equality of treatment, wage replacement benefits are scheduled by RCW 51.32.060 and .090. Under RCW 51.16.040, benefits for occupational disease are paid "in the same manner" as for industrial injury. RCW 51.32.180 requires disability benefits for occupational disease be the same as for industrial injury. To qualify and remain self insured, employers are required to provide benefits equal to those provided by the state under RCW 51.14.010, RCW 51.14.080. See also RCW 51.32.055.

[6] WAC 263-12-097(1) and 263-12-097(4). In addition, GR 33 requires courts and agencies subject to the rule making authority of the Supreme Court to accommodate

> [B]y not providing an interpreter . . . for communications with counsel during any of the hearings, the Board failed to comply with the statute's directive or its own regulations which required it to provide an interpreter to assist the workers "throughout the proceedings."

Further, Ms. Resulović hired an interpreter to respond to the Department's English-only discovery requests as ordered by the IAJ. EX. 7, last 2 pages.[7] That expense would have been unnecessary had the Board complied with the law. The Court of Appeals, however, ruled she was not prejudiced and thus not entitled to reimbursement. This ruling should be reviewed for two reasons. First, it is ordinarily deemed "prejudicial" to cause a party to incur unnecessary expenses; *vide e.g.* ***Steele v. Lundgren***, 85 Wn.App. 845, 859, 935 P.2d 671 (1997). Second, it is inconsistent with public policy to diminish Ms. Resulović's scheduled benefits due to her language disability because no such expenses are incurred by English-fluent workers. The ruling allows the Board to avoid providing required interpreter services with impunity and to shift interpreter expenses to those least able to afford them.

D. THE DEPARTMENT IS REQUIRED BY STATUTE TO PROVIDE FREE INTERPRETATION FOR LEP INJURED WORKERS.

Under RCW 2.43.010, a non-English speaking party to any legal proceeding is entitled to an interpreter. A legal proceeding is defined as a

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persons with disabilities; e.g., by furnishing translators "at no charge." GR 33(a)(1)(B). *Vide infra* section H.

[7] The Board miscopied the top line of the last page obscuring the interpreter's fee.

an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof." RCW 2.43.020. When the proceeding is initiated by the agency, it shall bear the cost of the interpreter. RCW 2.43.040.

The Court of Appeals followed ***Kustura***, where it applied the "last antecedent rule," holding a Department procedure determining benefits was not a "hearing" and, therefore, not a "legal" proceeding. In so doing, the Court of Appeals disregarded the interpretation of the "last antecedent" rule in ***Berrocal v. Fernandez***, 155 Wn.2d 585, 593, 121 P.3rd 82 (2005):

> But the rule further provides that 'the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to *all antecedents* instead of only the immediately preceding one.'

The qualifier in RCW 2.43.010 is preceded by a comma, indicating the last phrase is intended to apply to all antecedents, not merely the immediately preceding antecedent, which refers to "hearings." Had the Court of Appeals applied the last antecedent rule according to this Court's instruction in ***Berrocal***, it would have determined that a legal proceeding includes a proceeding before an administrative board or agency of the state. There is no doubt that the Department is a state agency.

The practical effect of this ruling is to require injured LEP workers

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[7] The Board miscopied the top line of the last page obscuring the interpreter's fee.

to pay for interpreters. Otherwise, they cannot communicate effectively with the Department or its agents (*e.g.* physicians conducting IMEs) to assure that all pertinent facts are before the agency before it issues orders establishing and/or terminating time loss or disability benefits.

The Department argues that the worker, not the agency, initiates the proceedings by asserting a claim. The truth is otherwise. By statute, employers are required to report all on-the-job injuries, following which the Department is required to investigate by RCW 51.04.020. As a first step in its investigation, the Department provides a form requiring the injured worker to provide a written account of the incident and the resulting injuries under penalty of perjury. [8] From the worker's standpoint, at least, governmental action is initiated by the agency.

Liberally interpreting the Act in Ms. Resulović's favor,[9] the Court should find that the Department initiated the proceedings on her claim.

E. LEP WORKERS RECEIVING ENGLISH-ONLY ORDERS ARE ENTITLED TO EQUITABLE RELIEF FROM THE 60-DAY BOARD APPEAL PERIOD.

In ***Rodriguez v. Dep't of Labor & Industries***, 85 Wn.2d 949, 540

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[8] The Department effectively serves as a law enforcement authority. For example, it may use the information from an injury investigation not only to establish time loss benefits (if any) but also to report on fraud as required under RCW 43.22.331, issue WSHA citations under RCW 49.17.130, *etc.* *Vide infra* fn. 19.

[9] RCW 51.12.010, As noted in ***Cockle v. Dep't of Labor & Industries,*** 142 Wn.2d 801; 811, 16 P.3d 583 (2001); "[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally

P.2d 1359 (1975), a Spanish-fluent worker appealed over 60 days after order issuance. Calling him "extremely illiterate," the Court said at 952:

> Two questions are presented: (1) whether appellant's notice of appeal was filed within the time limits prescribed in RCW 51.52.060 and, (2) if not, whether appellant's extreme illiteracy excused the untimely filing.

The Court ruled the appeal was not timely, but held that equity required waiver of the strict application of the 60-day period due to the worker's illiteracy. The Court noted that the Department knew or should have known of his illiteracy and would not be substantially prejudiced by allowing what appeared, at first, an untimely appeal, saying at 955:

> A report of the accidental injuries was made by the injured workman in a timely fashion, a full investigation thereof was conducted by the department, the claim was allowed and payments made thereon. No substantial prejudice will result to the department or the board from allowing appellant workman's appeal from the order closing his claim. Further, it is clear appellant was extremely illiterate and himself unable to ascertain or understand the nature and contents of the order communicated and the department knew or should have known of appellant's illiteracy at the time it closed his claim.

Petitioner Resulović is no less illiterate than the injured worker in ***Rodriguez***, insofar as English is concerned. It is undisputed she can neither read nor speak English. It is also undisputed the Department had actual knowledge of her inability to read or speak English. Finally, as in

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construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker."

Rodriguez, the Department will not be prejudiced by allowing her appeal. Her injuries were investigated and her claim was allowed. She asks only for a hearing to show the Board that 1) she needs additional medical care, 2) she has been effectively totally permanently disabled by her injury, and 3) her wages were calculated incorrectly.

In ***Kustura***, the Court of Appeals, however, found illiteracy insufficient to apply ***Rodriguez***, imposing additional requirements. In so doing, the Court effectively modified this Court's holding in ***Rodriguez***.

F. FREE INTERPRETER SERVICES ARE REQUIRED FOR DEPARTMENT INJURY INVESTIGATION AND CLAIM HANDLING.

As a matter of equal protection, the right to a free interpreter for the LEP under Title RCW 2.43 is the same as for the hearing impaired under RCW 2.42. ***State v. Marintorres***, 93 Wn.App. 442, 969 P.2d 501 (1999). RCW 2.42.120(4) requires free interpreters be provided in any law enforcement investigation. RCW 51.04.020 (6) requires the Department to investigate every serious on-the- job injury. In performing these investigations and exercising other statutorily assigned powers, the Department acts as a law enforcement agency in claims handling and investigation.[10] Mr. Resulović was entitled to an interpreter when required

[10] The Department uses information from an injury investigation to: report on fraud as required under RCW 43.22.331; issue WSHA citations under RCW 49.17.130; charge WISHA violations under RCW 49.17.180 or RCW 49.17.190; act on claims filed under RCW 51.28.030; charge false reporting under RCW 51.48.020; charge retaliation

to provide testimonial statements, just as LEP persons are entitled to interpreters when other agencies take sworn statements in investigations.[11]

By applying RCW 2.43 more restrictively based on its ***Kustura*** decision, the Division I decision here conflicts with Division III's equal protection analysis in ***Marintorres***. Therefore, this Court should accept review and to reconcile this conflict between Divisions I and III.

G. ENGLISH-ONLY ORDERS DEPRIVE LEP WORKERS OF EQUAL PROTECTION OF THE LAW.

The Department's policy is to furnish orders only in English to all injured LEP workers, except those who fluent in Spanish. Such a policy places non-Spanish speaking LEP workers – including those fluent only in Bosnian -- at a disadvantage. Although the native language of LEP workers is necessarily linked to their national origin, the Court of Appeals in ***Kustura***, *supra*, ruled the Department's policy did neither created a suspect classification based on national origin nor reflected purposeful discrimination against an identifiable group. Hence, the Court of Appeals reasoned and held, the Department's policy was not subject to strict scrutiny, but need only satisfy the "rational relation" or "rational basis"

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under RCW 51.48.025; penalize violation under RCW 51.48.080; penalize self-insured employers under RCW 51.48.017; penalize failure to cover workers under RCW 51.48.105; penalize workers under RCW 51.48.250 and RCW 51.48.260; order worker to reimburse money and pay interest under RCW 51.48.250 & .260; or refer workers for criminal prosecution under RCW 51.48.270, RCW 9A.56, and/or RCW 9A.72.

test.[12] In so ruling, the Court of Appeals overlooked authority to the effect that treatment based on a person's ability to speak English fluently constitutes discrimination based on national origin.[13] For example, this Court has ruled that adverse employment action because of a person's "foreign" accent may constitute discrimination based on national origin.[14]

In addition, Executive Order No. 13166, signed in 2000 by the President, states that federally assisted programs are required to "ensure that the programs and activities they normally provide in English are accessible to LEP persons ***and thus do not discriminate on the basis of national origin*** in violation of Title VI of the Civil Rights Act of 1964...." (Emphasis added). Title VII of the Civil Rights Act of 1964 bars such discrimination in employment including benefits like Industrial Insurance. Washington's Industrial Insurance Program has received substantial federal assistance from the US Department of Labor for many years and, therefore, is subject to Executive Order 13166. See APP. G.[15]

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[11] Statements under oath to government agencies are "testimonial" and are part of a legal proceeding. ***State v. Smith***, 97 Wn.2d 856, 651 P.2d 207 (1982) and ***Davis v. Washington***, 547 U.S. 813, 165 L.Ed.2d 224, 126 S.Ct. 2266 (2006).

[12] ***Macias v. Dep't of Labor & Industries***, 100 Wn.2d 263, 668 P.2d 1278 (1983).

[13] National origin is a suspect classification. ***Andersen v. King County***, 158 Wn.2d 1, 138 P.3d 963 (2006).

[14] ***Xieng v. Peoples Nat'l Bank***, 120 Wn.2d 512, 844 P.2d 389 (1993) ("Accent and national origin are obviously inextricably intertwined in many cases.")

[15] APP. G lists the federal assistance received by Washington's Industrial Insurance program accounts published in the state budget for the biennia 1997-2007.

In short, the Department policy to send orders to non-Spanish LEP fluent workers in a language they cannot understand creates a suspect class based on national origin. Classifications disadvantaging a suspect class are "presumptively invidious" under ***Macias***, *supra*, and require the State "to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."[16] The Department has prove neither any precise tailoring nor any "compelling governmental interest."

The Department's policy does not withstand even the more permissive "rational basis" test. This Court set forth the elements of this test in ***Willoughby v. Dep't of Labor & Industries***, 147 Wn.2d 725, 57 P.3d 611 (2002), stating at 739:

> Rational basis tests whether (1) all members of the class created within the statute are treated alike, (2) reasonable grounds exist to justify the exclusion of parties who are not within the class, and (3) the classification created by the statute bears a rational relationship to the legitimate purpose of the statute.

The Department's policy in this case fails at least two of the three parts of the test. First, the class of workers covered by the Department's policy are those not proficient in English, yet not all members of this class are treated alike. Spanish-fluent LEP workers are provided orders and notices in their own language, while other LEP workers are not.

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[16] Citing ***Plyler v. Doe***, 457 U.S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982).

Second, the Department's rationale for its discriminatory policy, namely, to avoid added costs [here, the cost of translating orders into Bosnian], has already been found insufficient by this Court.[17] In ***Willoughby***, the Court expressly rejected "cost saving arguments" when determining whether a statute satisfies the rational basis test, holding that "preservation of state funds is not in itself a sufficient ground to defeat an equal protection challenge." ***Willoughby***, at 743. *Accord,* ***Cockle.***

The Court of Appeals here and in ***Kustura*** declined to follow ***Willoughby***, instead finding the cost-savings rationale persuasive.

H. ENGLISH-ONLY ORDERS DEPRIVE LEP WORKERS OF DUE PROCESS.

Ms. Resulović's rights under the Act triggered due process. ***Buffelen Woodworking v. Cook***, 28 Wn.App. 501, 625 P.2d 703 (1981). Fundamental to due process is notice and the right to be heard. ***Sherman v. Washington***, 128 Wn.2d 164, 184, 905 P.2d 355 (1995). To be meaningful, notice must (1) apprise a party of rights and (2) provide an opportunity to know and meet the opposing party's claims and a reasonable time to prepare and respond. ***Cuddy v. Dep't of Public Assistance***, 74 Wn.2d 17, 442 P.2d 617 (1968). "Unique information about the intended recipient" determines whether a notice is adequate or

[17] The Department's assertions about added cost are unsupported by any actual or estimated cost figures or by any other documented proof, which is not surprising in

not. ***Jones v. Flowers***, 547 U.S. 220, 126 S.Ct. 1708, 1716 (2006). The Court in ***Jones*** further stated (at 1715):

> [W]hen notice is a person's due . . .[t]he means employed must be such as one desirous of actually informing the [intended recipient] might reasonably adopt to accomplish it.

Here, notice of the 60-day time period for appeal was provided in a language the Department knew the worker could not understand. Rather than providing notice, the English-only orders prevented actual notice. As observed by the Arizona Supreme Court, using English to communicate with those unable to speak it "effectively bars communication itself." ***Ruiz v. Hull***, 191 Ariz. 441, 957 P.2d 984 (1998).[18]

I. EQUAL ACCESS TO JUSTICE REQUIRES LANGUAGE ACCOMMODATION FOR LEP WORKERS AND FINDING THESE APPEALS TIMELY.

The purpose of the Equal Access to Justice Movement is to ensure all equal access to the judicial system, government benefits, and fair government treatment. Report of the Task Force on Civil Justice Funding, ***Washington Civil Legal Needs Study***, (2003). The Bar Association, in ***Ensuring Equal Access for People with Disabilities: A Guide for***

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light of the fact that once the basic forms are translated, the cost of providing orders and notices in Bosnian (or virtually any other language) would be miniscule.

[18] Because the Department knew the English-only orders could not be read by the worker in this case, arguably the orders were never communicated to her, as required by RCW 51.52.060. If the orders were not "communicated" to her, the 60-day appeal period was not triggered until the contents of the orders and the appeal rights language therein were conveyed to her in terms she understood, as the Board found in ***Ferenćak v. Dep't of Labor & Industries***, *supra.*

Washington Courts[19] said in 2006, on page 1:

> When justice is inaccessible, the simple result is injustice. The need to eliminate barriers preventing access to our courts is real and immediate.

This report states at p. 3: "Access to the courts is a fundamental right, preservative of all other rights" and later that "the law requires courts to remove barriers and/or provide reasonable accommodations. What constitutes reasonable accommodation depends upon the particular circumstances."[20] At page 13, the Bar report notes administrative agencies must also provide accommodations to ensure equal access to justice.

The July 2007 ***Washington State LEP Plan***, published by the Office of the Administrator of the Courts states at pages 5-6:

> Federal and Washington law require that LEP persons be provided with competent interpreters in all court proceedings.
>
> Washington's interpreter statute [RCW 2.43] provides that the court, governmental body or agency initiating the proceeding is to pay for the interpreter in all legal proceedings in which the LEP individual is compelled to appear by the court, governmental body or agency.

As noted above, RCW 51.04.020 (6) requires the Department to investigate every serious on-the- job injury. In performing these investigations and exercising other statutorily assigned powers, the

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[19] Available on line at www.wsba.org/atj.

[20] This language is incorporated, as noted above, in the comment to GR 33 on required courtroom accommodation.

Department acts as a law enforcement agency.[21] As an injured worker, Ms. Resulović had to provide statements to the Department under civil and criminal penalty for which she could be subjected to Class C felony conviction, lose benefits, be fined up to $10,000, or be imprisoned. Ex. 1 & B-U. Thus, she was entitled to interpreter services when the Department made her provide testimonial statements, just like LEP persons agencies take sworn statements in other investigations.[22]

GR 33[23] accommodates language disabilities by providing for "Person with a disability" is defined by GR 33(a) (4) as any person covered by RCW 49.60 or any similar local state or federal laws. Washington's Law against Discrimination, RCW 49.60, forbids national origin discrimination as does Seattle's Municipal Code, SMC 14.06 *et seq.* The comment to GR 33 stresses the public importance of preventing discrimination by ensuring access to legal rights and remedies, saying:

> Access to justice for all persons is a fundamental right. It is the policy of the courts of this state to assure that persons with disabilities have equal and meaningful access to the judicial system. Nothing in this rule shall be construed to limit or invalidate the remedies, rights, and procedures accorded to any person with a disability under local, state, or federal law.

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[21] See fn. 10, *supra*, pp. 12-13.

[22] As noted above, because statements under oath to government agencies are "testimonial" and part of a legal proceeding. ***Smith***, *supra,* and ***Davis,*** *supra.*.

[23] Applicable to the Board by its adoption of WAC 263-12-125.

VI. ATTORNEY'S FEES & COSTS REQUEST

Petitioner requests attorney fees and costs pursuant to RCW 51.52.130, as construed in ***Brand v. Dep't of Labor & Industries***, 139 Wn.2d 659, 989 P.2d 1111 (1999) where the court ruled that prevailing on any issue entitles the worker to attorney fees on all issues. She also requests an award of her interpreter fees as costs under RCW 2.43.040(4).

VII. CONCLUSION

Review should be granted because the Court of Appeals' decision conflicts with several decisions of this Court and because this case presents issues of substantial public interest that should be determined by this Court. The Court is respectfully requested to reverse the Court of Appeals on all issues, to remand for further Board proceedings on the merits of her appeals consistent with this Court's opinion, and to award attorney's fees, costs, and reimbursement of interpreter costs.

DATED this 20th day of June 2008.

Ann Pearl Owen, WSBA# 9033
Attorney for Petitioner Emira Resulović

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EMIRA RESULOVIĆ, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	DIVISION ONE No. 59614-4-I UNPUBLISHED OPINION FILED: April 21, 2008

Per Curiam — Emira Resulović, an injured worker with limited English proficiency (LEP), appeals from a superior court judgment affirming a Board of Industrial Insurance Appeals (Board) order dismissing, as untimely, Resulović's appeals of two Department of Labor and Industries (Department) orders. Resulović contends that the Department was required to communicate the orders to her in Bosnian, her primary language, as well as provide her with interpreter services for all discovery and all communications between her and her attorney. Resulović also contends that the superior court erred in awarding the Department a statutory attorney fee and interest. Most of the issues raised by Resulović were recently resolved in Ferenćak v. Dep't of Labor & Indus., 142 Wn. App. 713, 175 P.3d 1109 (2008), Kustura v. Dep't of Labor & Indus., 142

Wn. App. 655, 175 P.3d 1117 (2008), or Meštrovac v. Dep't of Labor & Indus., 142 Wn. App. 693, 176 P.3d 536 (2008). We affirm.

I

The first challenged Department order, entered on April 2, 2001, set Resulović's rate of time loss compensation related to an industrial injury. In the second order, entered on February 20, 2004, the Department closed Resulović's claim with a permanent partial disability award. Resulović, through an attorney, appealed the two orders to the Board on January 19, 2005, and requested interpreter services for all communications addressed to her and her English-speaking attorney. Subsequently, the Board provided an interpreter to assist Resulović at the Board hearing, but neither the Board nor the Department agreed to reimburse or compensate Resulović for any other interpreter expenses she incurred after filing the appeals.[1]

Because a person aggrieved by a Department order must file a notice of appeal to the Board "within sixty days from the day on which a copy of the order, decision, or award was communicated to such person," RCW 51.52.060(1), the Board accepted Resulović's appeal subject to proof of timeliness.

Resulović, who is literate only in Bosnian, contended that the orders were not timely communicated to her because the orders were not in her primary language.

At the hearing, Resulović testified that over the years she has had several

[1] Resulović obtained the services of an interpreter to assist her in responding to the Department's request for admissions.

telephone conversations with a Department representative via an interpreter, including an hour-long conversation in 2000, for which she requested and received interpreter assistance. Janet Grigsby, a Department claims adjustor assigned to Resulović's claim, testified that the Department has a language line available to translate oral conversations with claimants. Grigsby testified that she recalled speaking to Resulović one time, but could not remember if the language line was used. Grigsby also testified that she remembers having spoken with Resulović's husband in English. The Board found that at all relevant times, Bosnian was the only language in which either Resulović or her husband was literate, and that Bosnian was the only language spoken in their home.[2]

Resulović acknowledged at the hearing that she had previously signed several English language forms that were submitted to the Department. However, she testified that she only understood these forms after someone translated them into Bosnian. Resulović explained that she had many Bosnian neighbors and acquaintances from the former Yugoslavia and that "there was always somebody who would help me out." The Board found that that Resulović, prior to filing her appeals in this case, did not seek translation of the challenged orders from English to Bosnian.[3]

Resulović further testified that her first understanding of the need to

---

[2] The Board's factual findings actually describe Resulović's primary language as Bosnian/Serbo-Croatian. Resulović testified that her native language in Yugoslavia was called Serbo-Croatian when she was growing up, but that it is now called Bosnian. Accordingly, we refer to her language as Bosnian.

[3] Resulović challenged this factual finding, but fails to cite to any portion of the record that indicates otherwise.

appeal a Department order she believed was wrong arose upon her doctor telling her that her bills had not been paid. This conversation occurred "immediately prior" to Resulović's initial meeting with her attorney on January 18, 2005.

An Industrial Appeals Judge (IAJ) issued a proposed decision dismissing the appeals as untimely. The Board affirmed the dismissals. The Board found that the orders were directed to Resulović at her last known address as shown by the records of the Department, that each order contained black-faced ten-point type on the same side as the decision advising Resulović of the Department's decisions, that each order was timely communicated to Resulović by U.S. mail in due course and only in the English language, and that Resulović did not file a protest or appeal within sixty days of the communication of either order. The Board further found that Resulović did not exercise necessary diligence in perfecting and prosecuting her claim for compensation. Thus, the Board concluded that no basis existed to grant Resulović equitable relief from applicable time requirements.

With one exception, the superior court adopted the findings of the Board,[4] affirmed the dismissal of the appeals as untimely, and awarded the Department $200 in statutory attorney fees plus interest from the date of entry of the judgment.

II

[4] The superior court struck a finding by the Board that Resulović "did not file an appeal within sixty days after the time her doctor told her that his bills had not been paid and that she had to appeal any Department order she thought was incorrect."

We begin our analysis with the following observations. "Under RCW 51.52.115, the Board's decision is prima facie correct and the burden of proof is on the party challenging that decision." Ferenćak, 142 Wn. App. at 719 (citing Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999)). "The superior court acts in an appellate capacity, reviewing the Board's decision de novo, but 'cannot consider matters outside the record or presented for the first time on appeal.'" Ferenćak, 142 Wn. App. at 719 (quoting Sepich v. Dep't of Labor & Indus., 75 Wn.2d 312, 316, 450 P.2d 940 (1969)). "We review the superior court's decision de novo to determine whether substantial evidence supports its findings and whether its 'conclusions of law flow from the findings.'" Ferenćak, 142 Wn. App. at 719 (quoting Ruse, 138 Wn.2d at 5). Substantial evidence is evidence "sufficient to persuade a fair-minded, rational person of the truth of the matter." R&G Probst v. Dep't of Labor & Indus., 121 Wn. App. 288, 293, 88 P.3d 413 (2004). Unchallenged factual findings are verities on appeal. Willoughby v. Dep't of Labor & Indus., 147 Wn.2d 725, 733 n.6, 57 P.3d 611 (2002) (citing State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

III

Resulović contends that the orders were not final because the Department did not, pursuant to RCW 51.52.060(1), properly "communicate" the contents of the orders sent to her because they were written in English, rather than in her primary language, thus precluding her from comprehending their import. However, the argument now advanced by Resulović was recently

decided adversely to her by this court. Kustura, 142 Wn. App. at 670 (citing Rodriguez v. Dep't of Labor & Indus., 85 Wn. 2d 949, 952-53, 540 P.2d 1359 (1975)).

Resulović next contends that Executive Order 13,166 requires federally assisted programs to communicate with LEP benefit applicants in their primary language and that, accordingly, she should prevail on this issue on that basis. We disagree.

Initially, we note that Executive Order 13,166 does not in fact require the Department to send all notices to LEP workers in their primary language. Instead, the order provides that

> [e]ach Federal agency shall examine the services it provides and develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency. Each Federal agency shall also work to ensure that recipients of Federal financial assistance (recipients) provide meaningful access to their LEP applicants and beneficiaries.

Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (August 11, 2000). We further note that the Department provides interpreters through a language line to assist in oral communications between claimants and the Department. Finally, we note that the executive order "is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person." Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (August 16, 2000). Because the executive order does not

provide a private right of action in favor of any person as against any person, it does not bestow an enforceable right upon Resulović.

IV

Resulović next contends that the Department's failure to notify her by letter written in her primary language violated her right to receive due process of law. "Due process requires that the agency gave the appealing party adequate notice and an opportunity to be heard, and that procedural irregularities did not undermine the fundamental fairness of the proceedings." Kustura, 142 Wn. App. at 674 (citing Sherman v. State, 128 Wn.2d 164, 184, 905 P.2d 355 (1995)). Because due process requires such procedural protections as the particular situation demands, in analyzing this contention,

> we weigh the following factors to determine what process is due in a particular situation: (1) the private interest at stake in the governmental action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government interest, including the additional burdens that added procedural safeguards would entail.

Kustura, 142 Wn. App. at 674 (citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

As we noted in Kustura, "all workers suffering an industrial injury 'have a vested interest in disability payments upon determination of an industrial injury.'" Kustura, 142 Wn. App. at 675 (quoting Willoughby v. Dep't of Labor & Indus., 147 Wn.2d 725, 733, 5 P.3d 611 (2002)). Here, as in Kustura, the Department made a determination allowing Resulović's claim and issuing orders entitling her

to compensation. Her attempt to appeal was prompted by her desire to challenge the amount of compensation awarded. She had a vested right at stake. See Kustura, 142 Wn. App. at 675.

In considering the next question, whether the Department's procedures created the risk of an erroneous deprivation of such interest, we must examine whether the notice given was "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Kustura, 142 Wn. App. at 675-76 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)).

To satisfy requirements of due process, the Department's notices must have reasonably informed Resulović that she should make further inquiries and not put her at risk of being wrongfully denied benefits. Kustura, 142 Wn. App. at 675. Resulović had on multiple occasions communicated with the Department over the telephone via an interpreter provided by the Department. She also had many neighbors who spoke her primary language who helped her understand Department forms before she signed and returned them. She testified that there was always someone who could help her. Most importantly, Resulović obtained benefits from the Department, including a permanent partial disability award.[5] This consideration does not militate in favor of Resulović's position.

[5] While we recognize that Kustura has not foreclosed the possibility of establishing a due process violation, we note that existing Department procedures allow workers to seek relief from appeal deadlines based on equitable considerations. See Kustura, 142 Wn. App. at 673 n.20. The existence of this potential remedy is now part of the Department's "procedures." Given the availability of this remedy as a possibility, it is difficult to envision the circumstances that would constitute a due process violation.

The third question was recently resolved.

> [W]ere we to find a due process problem under Mathews v. Eldridge, the Department provides convincing arguments that the burden of providing complete, free interpreter services for all LEP workers would create a huge budgetary burden it is not able to withstand. In the absence of a showing that workers are significantly prejudiced by the Department's procedures, there is no due process violation.

Kustura, 142 Wn. App. at 677. Resulović has not established that the Department procedures violated her due process rights.

V

Resulović next contends that the IAJ's decision to provide her with interpreter services only for testimony at the hearing, but not for communications with her counsel outside of the hearing, violated chapter 2.43 RCW, public policy as expressed by that chapter, and constitutional due process and equal protection[6] concerns. We addressed similar issues in Kustura, Ferenćak, and Meštrovac, and held that "neither chapter 2.43 RCW nor constitutional due process or equal protection considerations entitle nonindigent LEP injured workers to free interpreter services for communications with counsel outside of legal proceedings for which an interpreter has already been appointed during an appeal of the Department's benefits calculation." Ferenćak, 142 Wn. App. at

[6] Citing State v. Marintorres, 93 Wn. App. 442, 969 P.2d 501 (1999), Resulović argues for the first time in her reply brief that there is no rational basis for treating LEP claimants differently from hearing-impaired claimants, who are provided free interpreter services. However, hearing-impaired claimants are distinctly different from LEP claimants. A hearing impairment is a physical disability. Being limited in English proficiency is not. Moreover, Marintorres involved interpreter costs for defendants in criminal cases. "In this state, the right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and 'the right inherent in a fair trial to be present at one's own trial.'" State v. Gonzales-Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999) (quoting State v. Woo Won Choi, 55 Wn. App. 895, 901, 781 P.2d 505 (1989)). Given that the Sixth Amendment does not apply to civil actions, Resulović's reliance upon Marintorres is unavailing.

728 (citing Kustura, 142 Wn. App. at 679-83, 686-89). Accord Meštrovac, 142 Wn. App. at 707-08.[7] Here, the Board properly provided an interpreter throughout Resulović's hearing. Under these circumstances, she is not entitled to be reimbursed for interpreter expenses incurred outside of that hearing.

Resulović also contends that by denying her request for interpreter services the Board violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2004), which prohibits discrimination based on national origin.[8] Section 601 of Title VI prohibits recipients of federal financial assistance from discriminating based on race, color, or national origin. Alexander v. Sandoval, 532 U.S. 275, 278, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). While there is a private right of action to enforce Section 601 of Title VI in circumstances of intentional discrimination, there is no private Title VI right of action with regard to disparate-impact claims. Alexander, 532 U.S. at 279, 293.

Resulović's claim fails for several reasons. Initially, Resulović does not explain how a worker may raise such a discrimination claim in an appeal under Title 51 RCW, rather than in an independent action. In addition, Resulović has not established that the Department intentionally discriminated against her based on her national origin. As we recently held, "the Department's procedures

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[7] Claim administration at the Department level is not a "legal proceeding" governed by RCW 2.43.030. Kustura, 142 Wn. App. at 679. The statute "applies only to hearings before the Board and requires the Board to appoint an interpreter to assist a non-English-speaking claimant 'throughout the hearing,'" which "does not include matters beyond the hearing itself, including communications with counsel outside of the hearing and other trial preparation." Kustura, 142 Wn. App. at 680 n.47 (quoting RCW 2.43.030).

[8] The Department contends that Resulović waived this claim for review because she failed to raise it to the Board in her petition for review on appeal. The Department is wrong. Resulović did raise such a claim in her petition for review to the Board.

have not singled out these and other Bosnian workers as one particular language group and denied them benefits on that basis. As such, they did not create a suspect class based on national origin." Kustura, 142 Wn. App. at 687. That decision is dispositive.[9]

VI

For the first time on appeal, Resulović raises several additional arguments. First, she contends that denying her request for additional interpreter services violates both Washington's Law Against Discrimination, chapter 49.60 RCW, and her right to counsel pursuant to WAC 263-12-020.[10] In addition, she claims that the Board's rulings and the Department's actions impermissibly shift the costs of seeking benefits onto the injured LEP worker. Finally, she contends that the challenged orders did not constitute final orders because the Department's notice failed to comply with the black face type requirements in RCW 51.52.050.[11] Generally, we will not consider issues raised

[9] Resulović cites to a portion of a Department bulletin that discusses whether a failure to provide interpreter services violates Title VI. However, this bulletin was not presented to the Board but, rather, was presented to us, in partial form, as an appendix to Resulović's brief on appeal. Thus, we will not consider it. We do note, however, that the bulletin expressly states that the policy does "not apply to interpretive services for legal purposes." Interpretive Servs. Payment Policy, Provider Bulletin (Dep't of Labor & Indus. Health Servs. Analysis Section, Olympia, WA), March 2005, at 2. Thus, even were we to consider it, our analysis would remain unchanged.

[10] WAC 263-12-020(1)(a) discusses who may appear before the Board: "Any party to any appeal may appear before the board at any conference or hearing held in such appeal, either on the party's own behalf or by an attorney at law or other authorized lay representative of the party's choosing as prescribed by [WAC 263-12-020(3)].

[11] RCW 51.52.050 provides that a copy of a final Department decision must be sent to the worker and

> shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

for the first time on appeal. RAP 2.5(a). Furthermore, RCW 51.52.104 states that a petition for review of an IAJ decision shall "set forth in detail" the grounds for appeal and failure to do so results in waiver of the issue. Ferenćak, 142 Wn. App. at 729; Kustura, 142 Wn. App. at 673-74 n.22. Because Resulović failed to properly and timely raise these issues, we will not discuss them further.

VII

Even if her appeals were untimely, Resulović contends that the appeal deadline should be waived on equitable grounds. This argument is similar to the argument made by two of the appellants in Kustura. Indeed, Resulović cites the same authority in support of her argument as was cited by the Kustura litigants. See Kustura, 142 Wn. App. at 669-73 (discussing Kingery v. Dep't of Labor & Indus., 132 Wn.2d 162, 937 P.2d 565 (1997); Rodriguez v. Dep't of Labor & Indus., 85 Wn.2d 949, 540 P.2d 1359 (1975); Ames v. Dep't of Labor & Indus., 176 Wash. 509, 30 P.2d 239 (1934); Fields Corp. v. Dep't of Labor & Indus., 112 Wn. App. 450, 45 P.3d 1121 (2002)).

In Kustura, two workers, one from Serbia and one from Bosnia, were not fluent in English.[12] Kustura, 142 Wn. App. at 665. Both failed to appeal their respective wage rate orders, but each did appeal other orders issued at different times. Kustura, 142 Wn. App. at 670. We held that the workers were not entitled to equitable relief absent a showing that they were incompetent, that the Department committed misconduct, or that they exercised diligence in pursuing

[12] The Kustura decision resolved the consolidated appeals of three workers. Our discussion herein refers to appellants Gordana Lukić and Maida Memišević. Kustura, 142 Wn. App. at 665.

their claims. Kustura, 142 Wn. App. at 673. We noted that "unlike the claimants in Rodriguez and Ames, both [workers] were available and competent at the time they received the Department orders. And unlike the appellants in Rodriguez and Ames, they cite no extraordinary circumstances preventing them from receiving the orders or timely challenging them." Kustura, 142 Wn. App. at 673.

Although equitable relief is not limited to those cases involving incompetent or illiterate claimants, that in and of itself did not assist the workers in Kustura "because both were represented by counsel and/or had access to interpreters and neither adequately explained the failure to appeal the wage orders, evidencing a lack of diligence." Kustura, 142 Wn. App. at 673 n.20 (emphasis added).

Here, Resulović both had access to neighbors who translated Department forms for her and knew that she could request and obtain an interpreter when talking to Department representatives on the telephone. She cites no extraordinary circumstances that prevented her from receiving the orders, taking timely steps to facilitate her understanding of their import, or timely challenging the orders by filing an appeal with the Board. She has not adequately explained why she did not make further inquiries when she received the orders. The superior court did not err when it adopted the Board's findings that Resulović did not exercise necessary diligence in perfecting and prosecuting her claim for compensation. Thus, neither the superior court nor the Board erred by concluding that she is not entitled to equitable relief.[13]

[13] Resulović also cites to Rabey v. Dep't of Labor & Indus., 101 Wn. App. 390, 3 P.3d

VIII

Citing RCW 51.52.130, Resulović next contends that the trial court erred in awarding the Department a statutory attorney fee and interest. We held such an award proper in Ferenćak, 142 Wn. App. at 729-30. The superior court may award $200 in statutory attorney fees to the prevailing party under RCW 4.84.030 and RCW 4.84.080. Ferenćak, 142 Wn. App. at 730. Accordingly, the trial court may impose interest pursuant to RCW 4.56.110. There was no error.

Affirmed.

FOR THE COURT:

Dwyer, A.C.J.

Cox, J.

217 (2000), a case that was not discussed in Kustura. However, Rabey is not helpful to Resulović. In Rabey, the court granted equitable relief to a widow who failed to file an application for survivor benefits within one year of her husband's death. Rabey, 101 Wn. App. at 392. The court found that the widow was shocked and disoriented by her husband's death. Rabey, 101 Wn. App. at 397. The court also noted the significance of the fact that when the widow was attempting to pick up the pieces of her life and console her children, she asked her husband's employer's human resource manager to determine if she had a legitimate claim for benefits. Rabey, 101 Wn. App. at 397. Although the manager agreed to do so, the widow never heard back from the manager. The court found that the widow reasonably believed that she had no claim. Rabey, 101 Wn. App. at 398. Unlike Resulović, the widow did not exhibit a lack of diligence in perfecting her claim, thus precluding equitable relief. Rabey, 101 Wn. App. at 398.

Leach, J.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
600 University Street
(206) 464-7750
TDD: (206) 587-5505

May 22, 2008

Ann Pearl Owen
Ann Pearl Owen PS
2407 14th Ave S
Seattle, WA. 98144-5014

Masako Kanazawa
Attorney at Law
800 5th Ave Ste 2000
Seattle, WA. 98104-3188

CASE #: 59614-4-I
Emira Resulovic, Appellant v. Department of Labor & Industries, Respondent
King County No. 06-2-07059-3 SEA

Counsel:

Enclosed please find a copy of the order denying motion for reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

For counsel's information, the Supreme Court has determined that a filing fee of $200.00 will be required in that court.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Hon. Douglass A. North
Reporter of Decisions

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EMIRA RESULOVIĆ, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	DIVISION ONE No. 59614-4-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Emira Resulović, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 22nd day of May, 2008.

FOR THE COURT:

Duyn, A. C. J.
Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAY 22 PM 2:14

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
PO BOX 44291
OLYMPIA, WA 98504-4291

MAILING DATE	04/02/2001
CLAIM NUMBER	X304647
INJURY DATE	11/23/1999
CLAIMANT	RESULOVIC EMIRA
EMPLOYER	BIRTHDAY EXPRES
UBI NUMBER	601 553 086
ACCOUNT ID	871, 733-00
RISK CLASS	6407
SERVICE LOC	Seattle

EMIRA RESULOVIC
3434 S 144TH ST APT 324
SEATTLE WA 98168-4063

NOTICE OF DECISION

The worker's time-loss compensation rate is $778.67 per month. The worker's total compensation rate includes all cost-of-living increases the department has allowed since the date of injury.

The worker's total time-loss compensation rates (above) were calculated by taking into account the following:

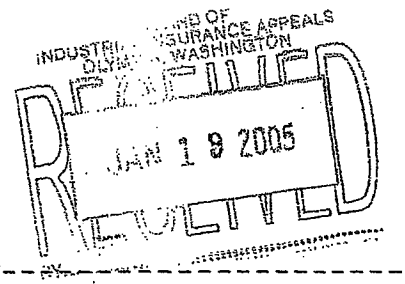
Earnings based on: $8.25 per hour, 10 hours per day, 3 days per week.

Worker's total gross wages: at the time of injury were set at $1072.50 per month.

Worker's employment pattern: regularly employed.

Worker's Martial Status: married with 1 dependents.

Supervisor of Industrial Insurance
By Linda J. Canton
Claims Manager
(360) 902-4346



|| YOUR LEGAL RIGHTS IF YOU DISAGREE WITH THIS ORDER: THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING. YOU CAN EITHER FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA 98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS, PO BOX 42401, OLYMPIA WA 98504-2401. ||

APPENDIX C

EMPL: BIRTHDAY EXPRESS INC
11220 120TH AVE NE
KIRKLAND WA 98033

PROV: SCHIFF STAN R MD
STE 380
10330 MERIDIAN AVE N
SEATTLE WA 98133-9463

CLMT: EMIRA RESULOVIC
3434 S 144TH ST APT 210
SEATTLE WA 98168-4062

State of Washington
Department of Labor and Industries
Division of Industrial Insurance
Olympia, WA 98504-4291

Claim Number : X304647
Work Position ID: UN10
Mailing Date : 02/20/04
Injury Date : [redacted]
Service Location: SEATTLE
UBI # : 601-553-086
Account ID : 871,733-00
Risk Class : 6407

PAYMENT ORDER

THE CLAIMANT'S PERMANENT PARTIAL DISABILITY AWARD IS FOR:

CATEGORY 5 PERMANENT DORSO-LUMBAR AND/OR LUMBOSACRAL IMPAIRMENTS.

THE CLAIMANT'S TOTAL AWARD FOR PERMANENT PARTIAL DISABILITY IS
$ 34316.49

TOTAL BENEFITS IN THE AMOUNT OF	$ 34316.49
LESS DEDUCTIONS:	
BALANCE OF UNPAID PPD	$ 26100.99-
NET ENTITLEMENT	$ 8215.50

THIS CLAIM IS CLOSED.

THE WORKER'S INITIAL CASH AWARD IS: $ 8215.50
THE BALANCE OF PERMANENT PARTIAL DISABILITY OF $ 26100.99 TO BE PAID AT THE RATE OF $ 829.59 PER MONTH, PLUS 8% INTEREST PER ANNUM ON THE UNPAID BALANCE. SEE ACCOMPANYING SCHEDULE OF PAYMENTS.

BOARD OF INDUSTRIAL INSURANCE APPEALS OLYMPIA, WASHINGTON
RECEIVED
JAN 19 2005

Name : JANET GRIGSBY
Title: CLAIMS MANAGER
Phone: 360-902-4533

| YOUR LEGAL RIGHTS IF YOU DISAGREE WITH THIS ORDER:
| THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING. YOU CAN EITHER FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA 98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS, PO BOX 42401, OLYMPIA, WA. 98504-2401.

RCW 51.52.050 Service of departmental action — Demand for repayment — Reconsideration or appeal.

Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, which shall be addressed to such person at his or her last known address as shown by the records of the department. **The copy**, in case the same is a final order, decision, or award, **shall bear** on the same side of the same page on which is found the amount of the award, **a statement, set in black faced type** of at least ten point body or size, **that such final order**, decision, or award **shall become final within sixty days from the date the order is communicated to the parties unless** a written request for reconsideration is filed with the department of labor and industries, Olympia, or **an appeal is filed with the board of industrial insurance appeals**, Olympia: PROVIDED, That a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal: PROVIDED, That in an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

[Emphasis added]

APPENDIX E

Nothing in case law, statute, regulation or policy supports the claimant's contention that the Board or Department should provide interpreter services at all stages of a worker's appeal. Further, I am far from persuaded that this Board has jurisdiction to order the Department to pay the cost of interpreter's services. Mr. Ferencak did not present persuasive evidence or authority to establish entitlement to such services other than those provided.

FINDINGS OF FACT

1. On March 26, 2002, the Department received an application for benefits alleging that the claimant sustained a right leg injury on March 20, 2002, in the course of his employment with Travis Industries, Inc. On April 15, 2002, the claim for right leg injury was allowed under Claim No. Y-388825 as an industrial injury.

   In Docket No. 02 23491, the claimant filed an appeal on November 15, 2002, from a Department order dated May 2, 2002, that paid time loss compensation benefits from April 12, 2002 through April 26, 2002, and set the time loss rate for the payment period at $1,396.50 per month.

   On January 3, 2003, the Board issued an order granting the appeal, subject to proof of timeliness, assigning Docket No. 02 23491, and directing that further proceedings be held. The parties stipulated that the appeal was filed within sixty days after an interpreter communicated to the claimant the significance of the Department order.

   In Docket No. 02 21795, the claimant filed an appeal on November 15, 2002, from a Department order dated May 6, 2002 that described the wage rate calculation method. The claimant's wage for the job of injury was based on $11.50 per hour, eight hours per day, five days per week = $2,024 per month; additional wage for the job of injury include: health care benefits...$175 per month; tips...none per month; bonuses...none per month; overtime...none per month; housing/board/fuel...none per month; worker's total gross wage is $2,199 per month; marital status eligibility on the date of this order is married with two children.

   On December 12, 2002, the Board issued an order extending the time to act on the appeal for an additional ten days. On December 24, 2002, the Board issued a second order extending the time to act on the appeal for an additional ten days. On January 3, 2003, the Board issued an order granting the appeal, subject to proof of timeliness, assigning Docket No. 02 21795, and directing that further proceedings be held. The parties stipulated that the appeal was filed within sixty days after an interpreter communicated to the claimant the significance of the Department order.

In Docket No. 02 23492, the claimant filed an appeal on November 15, 2002, from a Department order dated May 14, 2002 that paid time loss compensation benefits from April 27, 2002 through May 10, 2002, and set the time loss compensation rate for the period at $1,396.50 per month.

On January 3, 2003, the Board issued an order granting the appeal, subject to proof of timeliness, assigning Docket No. 02 23492, and directing that further proceedings be held. The parties stipulated that the appeal was filed within sixty days after an interpreter communicated to the claimant the significance of the Department order.

In Docket No. 02 23698, the claimant filed an appeal on November 15, 2002, from a Department order dated May 28, 2002 that paid time loss compensation benefits from May 11, 2002 through May 24, 2002, and set the time loss compensation rate for the period at $1,396.50 per month.

On January 3, 2003, the Board issued an order granting the appeal, subject to proof of timeliness, assigning Docket No. 02 23698, and directing that further proceedings be held. The parties stipulated that the appeal was filed within sixty days after an interpreter communicated to the claimant the significance of the Department order.

In Docket No. 02 22295, the claimant filed an appeal on November 25, 2002, from a Department order dated November 18, 2002 that provide a partial payment of time loss compensation benefits to adjust for prior payments from May 25, 2002 through November 1, 2002, based upon varying compensation rates. The order corrected and superseded orders dated June 20, 2002, July 2, 2002, July 16, 2002, July 30, 2002, August 13, 2002, August 27, 2002, September 10, 2002, September 24, 2002, October 8, 2002, October 22, 2002, and November 5, 2002.

On December 24, 2002, the Board issued an order extending the time to act on the appeal for an additional ten days. On January 3, 2003, the Board issued an order granting the appeal, assigning Docket No. 02 22295, and directing that further proceedings be held.

In Docket No. 02 22296, the claimant filed an appeal on November 25, 2002, from a Department order dated November 19, 2002 that paid time loss compensation benefits from November 2, 2002 through November 15, 2002 and set the time loss compensation rate for the period at $1,409.42 per month or $46.98 per day.

Federal Funds Received by Department of Labor & Industries & by Washington's Industrial Insurance Program

1997-2007

Biennium	Total Federal Funds In DLI Budget	Federal Funds in Accident Account	Federal Funds in Medical Aid Account	ESSB Reference
1997-1999	$16,706,000	$9,112,000	$1,592,000	6062 § 218
1999-2001	$16,654,000	$9,112,000	$1,592,000	5180 § 217
2001-2003	$20,956,000	$11,568,000	$2,438,000	6153 § 217
2003-2005	$24,818,000	$13,396,000	$2,960,000	5404 § 217
2005-2007	$26,806,000	$13,621,000	$3,185,000	6090 §217
Total	$105,940,000	$56,809,000	$11,767,000	